



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 998

[Docket No. 220927-0201]

RIN 0648-BL23

Protected Communications; Prohibition of Retaliatory Personnel Actions

AGENCY: Office of Marine and Aviation Operations (OMAO), National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce.

ACTION: Final rule.

SUMMARY: On December 23, 2020, the President signed into law the National Oceanic and Atmospheric Administration Commissioned Officer Corps Amendments Act of 2020, which applies the Military Whistleblower Protection Act to officers of the National Oceanic and Atmospheric Administration Commissioned Officer Corps (NOAA Corps). This final rule provides regulations pursuant to Section 207 of the National Oceanic and Atmospheric Administration Commissioned Officer Corps Amendments Act of 2020 and applies the Military Whistleblower Protection Act to the NOAA Corps to align Department of Commerce policy and procedure with this law.

DATES: This rule is effective [*insert date 30 days after the date of publication in the Federal Register*].

FOR FURTHER INFORMATION CONTACT: LCDR Zachary Cress, NOAA Corps, OMAO Strategic Management Division, (301) 713-1045.

SUPPLEMENTARY INFORMATION:

Background

As members of a uniformed service, NOAA Corps officers are not covered under the Whistleblower Protection Act (5 U.S.C. 2302). Furthermore, prior to the enactment of

the National Oceanic and Atmospheric Administration Commissioned Officer Corps Amendments Act of 2020 (Public Law 116-259, “the NCAA”), NOAA Corps officers were also not covered by the Military Whistleblower Protection Act (10 U.S.C. 1034), leaving them without statutory protection for whistleblowing activities.

Protected Communications; Prohibition of Retaliatory Personnel Actions

Section 207 of the NCAA applies the Military Whistleblower Protection Act to the NOAA Corps and authorizes the Secretary of Commerce to prescribe regulations to carry out the application of that law, including by prescribing such administrative procedures for investigation and appeal within the NOAA Corps as the Secretary considers appropriate. The Military Whistleblower Protection Act prohibits taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, in reprisal against a member of the Armed Forces for protected communications. Protected communications are lawful communications to a Member of Congress, an Inspector General, any person or organization in the member’s chain of command, and any other person or organization authorized to receive such protected communications. By contrast, a communication is unlawful, and is therefore not a protected communication, where it is prohibited by statute or regulation, including information that is classified, a trade secret, or commercial in nature, or information concerning a personal privacy interest. The Military Whistleblower Protection Act also permits the correction of military records when a prohibited personnel action is taken.

NOAA Corps officers generally have a duty to report information evidencing a violation of law or regulation (including sexual harassment or discrimination), gross mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health or safety. This final rule protects lawful disclosures of such information, and implements the Military Whistleblower Protection Act for the NOAA Corps pursuant to Section 207 of the NCAA, prohibiting any NOAA

Corps officer or employee of the Department of Commerce from taking or threatening to take a personnel action, or withholding or threatening to withhold a personnel action against a NOAA Corps officer for making or preparing or being perceived as making or preparing a protected communication.

This final rule prescribes responsibilities of the Inspector General of the Department of Commerce to investigate claims of reprisal against NOAA Corps officers and to report those findings to the Secretary, the Administrator, the NOAA Deputy Under Secretary for Operations, the Director, and to the NOAA Corps officer or former NOAA Corps officer making the allegation. Based on the Inspector General's report, the Director or Deputy Under Secretary for Operations, as appropriate, are required to take appropriate administrative disciplinary action against the individual or individuals found to have taken, withheld, or threatened a personnel action as reprisal.

This final rule prescribes procedures by which a NOAA Corps officer or former NOAA Corps officer who has filed a complaint investigated by the Inspector General alleging reprisal may request that the Director convene a Records Examination Board to determine whether information contained in a NOAA Corps officer's personnel files should be corrected and to make recommendations to the Director concerning corrections, deletions, or additions to the NOAA Corps officer or former NOAA Corps officer's personnel records. Under these procedures, the Director must then issue a decision concerning the correction of the NOAA Corps officer's or former NOAA Corps officer's records within 60 days and notify the Inspector General of their decision. If the NOAA Corps officer or former NOAA Corps officer disagrees with the Director's decision on a Records Examination Board's recommendations, the officer may request an additional level of review by the Deputy Under Secretary for Operations, whose decision constitutes the final agency action.

Classification

Pursuant to 5 U.S.C. 553(a)(2), the provisions of the Administrative Procedure Act (APA) requiring notice of proposed rulemaking and the opportunity for public participation are inapplicable to this final rule because this rule falls within the agency management and personnel exception as it strictly regulates NOAA Corps personnel, addresses internal agency management, and affects only persons outside the agency through protecting certain communications to specified members of the public.

This rule has been determined to be not significant for purposes of Executive Order 12866.

Because this regulation is exempt from the notice and comment provisions of the APA, the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply. Accordingly, no Regulatory Flexibility Analysis is required and none has been prepared.

This rule does not have any collection of information requirements under the Paperwork Reduction Act.

List of Subjects in 15 CFR Part 998

Administrative practice and procedure, Government employees, Military personnel, Whistleblowing.

Dated: September 27, 2022.

Richard W. Spinrad,
*Under Secretary of Commerce
for Oceans and Atmosphere
and NOAA Administrator.*

For the reasons set out in the preamble, 15 CFR part 998 is amended as follows:

PART 998 – NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION COMMISSIONED OFFICER CORPS

1. Add an authority citation for part 998 to read as follows:

Authority: 33 U.S.C. 3001 *et seq.*

2. Add subpart D to read as follows:

**Subpart D – National Oceanic and Atmospheric Administration Commissioned
Officer Corps Whistleblower Protections**

Sec.

998.40 Purpose.

998.41 Applicability.

998.42 Definitions.

998.43 Requirements.

998.44 Responsibilities.

998.45 Procedures.

**Subpart D – National Oceanic and Atmospheric Administration Commissioned
Officer Corps Whistleblower Protections**

Authority: 33 U.S.C. 3071(a)(8), (a)(13), (b), and (c); 10 U.S.C. 1034 and 1090a.

§ 998.40 Purpose.

This subpart—

- (a) Establishes policy and implements 33 U.S.C. 3071(a)(8), (a)(13), (b), and (c) to provide protection against reprisal to NOAA Corps officers for making or preparing or being perceived as making or preparing a protected communication.
- (b) Assigns responsibilities and delegates authority for such protection against reprisal and prescribes procedures.

§ 998.41 Applicability.

This subpart applies to NOAA Corps officers, personnel boards convened by the Director of Office of Marine and Aviation Operations (OMAO) and the NOAA Corps (Director), and the Inspector General of the Department of Commerce.

§ 998.42 Definitions.

As used in this subpart, the following terms shall have the meaning stated:

Corrective action means any action deemed necessary to make the complainant whole, changes in agency regulations or practices, administrative or disciplinary action against offending personnel, and/or referral to the United States Attorney General of any evidence of criminal violation.

Inspector General means the Inspector General in the Office of Inspector General of the Department of Commerce or any other Inspector General, as appointed under the Inspector General Act of 1978, as amended.

Investigation report means a report issued by the Inspector General of the Department of Commerce that includes a thorough review of the facts and circumstances relevant to an allegation of reprisal against a NOAA Corps officer, the relevant documents acquired during the investigation, and summaries of interviews conducted.

Personnel action means an action taken, or the failure to take an action, that affects or has the potential to affect a NOAA Corps officer's position and/or career. Personnel actions include disciplinary or corrective actions; a transfer or reassignment; significant changes in the duties or responsibilities of a NOAA Corps officer not commensurate with their grade; an inaccurate assessment of an officer's performance, skills, qualities, aptitudes, potential, or value to the NOAA Corps in the NOAA Corps officer's annual or semiannual officer evaluation reports; a decision concerning promotion, pay, benefits, awards, or training; separation; discharge; referral for mental health evaluations in accordance with 10 U.S.C. 1090a; the failure of a superior to respond to a retaliatory or harassment action against a NOAA Corps officer by one or more subordinate when the superior had knowledge of the retaliatory or harassment action; and conducting a retaliatory investigation against a NOAA Corps officer.

Protected communication means any lawful communication to a Member of Congress or an Inspector General; or a communication in which a NOAA Corps officer complains of, or discloses information that they reasonably believe evidences a violation of law or regulation (including sexual harassment or discrimination), gross mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health or safety, when such communication is made to any of the following: a Member of Congress; an Inspector General; a member of a Department of Commerce audit, inspection, investigation, or law enforcement organization; any person or organization in the chain of command; and any other person or organization designated pursuant to regulations or other established administrative procedures to receive such communications.

Records Examination Board means a NOAA Corps personnel board convened by the Director to determine whether information contained in a NOAA Corps officer's personnel files should be corrected.

Reprisal means taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action against a NOAA Corps officer for making or preparing or being perceived as making or preparing a protected communication.

Retaliatory investigation means an investigation requested, directed, initiated, or conducted for the purpose of punishing, harassing, or ostracizing a NOAA Corps officer for making a protected communication.

§ 998.43 Requirements.

(a) No person within the Department of Commerce may restrict a NOAA Corps officer from making a lawful communication to a Member of Congress or an Inspector General.

(b) A NOAA Corps officer shall be free from reprisal for making or preparing or being perceived as making or preparing a protected communication.

(c) Any NOAA Corps officer or employee of the Department of Commerce who has the authority to take, direct others to take, or recommend or approve any personnel action shall not, under such authority, take or threaten to take a personnel action, or withhold or threaten to withhold a personnel action, as reprisal against any NOAA Corps officer for making or preparing or being perceived as making or preparing a protected communication.

§ 998.44 Responsibilities.

(a) The Inspector General of the Department of Commerce:

(1) Shall expeditiously determine whether there is sufficient evidence to warrant an investigation of an allegation that a personnel action has been taken, withheld, or threatened as reprisal for making or preparing or being perceived as making or preparing a protected communication. No investigation is required when such allegation is submitted more than 1 year after the NOAA Corps officer or former NOAA Corps officer became aware of the personnel action that is the subject of the allegation. However, the Inspector General of the Department of Commerce may consider a complaint of reprisal received more than 1 year later based on compelling reasons or circumstances. These circumstances may include situations in which the NOAA Corps officer or former NOAA Corps officer:

- (i) Was actively misled regarding their rights; or
- (ii) Was prevented from exercising their rights.

(2) Shall, if an investigation described in paragraph (a)(1) of this section is warranted, initiate a separate investigation of the underlying allegations contained in the protected communication if a prior investigation has not already been initiated, or if the

Inspector General of the Department of Commerce determines that the prior investigation was biased or inadequate.

(3) Shall, except as provided in paragraph (a)(5) of this section, complete the investigation of the allegation of reprisal and issue a report not later than 180 days after receipt of the allegation, which shall include a thorough review of the facts and circumstances relevant to the allegation, the relevant documents acquired during the investigation, and summaries of interviews conducted. The report may also include a recommendation as to the disposition of the complaint.

(4) Shall submit a copy of the investigation report to the Secretary, the Administrator, the NOAA Deputy Under Secretary for Operations, the Director, and to the NOAA Corps officer or former NOAA Corps officer making the allegation. In the copy of the investigation report transmitted to the NOAA Corps officer or former NOAA Corps officer, the Inspector General of the Department of Commerce shall ensure the maximum disclosure of information possible, with the exception of information that is not required to be disclosed under the Freedom of Information Act (5 U.S.C. 552 *et seq.*). The Inspector General of the Department of Commerce may withhold the summaries of interviews conducted and documents acquired during the course of the investigation in the copy of the investigation report transmitted to the NOAA Corps officer or former NOAA Corps officer. If requested under this paragraph (a)(4), the summaries of interviews conducted and documents acquired during the course of the investigation shall be transmitted to the NOAA Corps officer or former NOAA Corps officer, with the exception of information that is not required to be disclosed under the Freedom of Information Act. This disclosure is separate from a disclosure resulting from a request submitted pursuant to the Freedom of Information Act or the Privacy Act (5 U.S.C. 552a *et seq.*). All other releases of information not made in accordance with this paragraph (a)(4) shall be processed pursuant to the respective disclosure statute that governs the

request seeking those records. The items may be transmitted with the copy of the investigation report or within a reasonable time after the transmittal of the copy of the investigation report to the NOAA Corps officer or former NOAA Corps officer, regardless of whether the request for those items is made before or after the copy of the investigation report is transmitted to the NOAA Corps officer or former NOAA Corps officer.

(5) Shall, if a determination is made that the investigation report cannot be issued within 180 days of receipt of the allegation, notify the Secretary and the NOAA Corps officer or former NOAA Corps officer making the allegation of the current progress of the investigation, the reasons why the investigation report will not be submitted within that time, and estimate the time remaining until completion and transmittal. Every 180 days thereafter until the transmission of the investigation report, the Inspector General of the Department of Commerce shall notify the Secretary and NOAA Corps officer or former NOAA Corps officer making the allegation of the current progress of the investigation and estimated time remaining until completion and transmittal of the investigation report.

(6) At the request of the Records Examination Board, shall submit a copy of the investigation report to the Records Examination Board. If the Records Examination Board requests further evidence and a further report as provided in paragraph (b)(3) of this section, the Inspector General of the Department of Commerce shall respond within 30 days, and not later than every 30 days thereafter, until the transmission of the further report.

(b) The Records Examination Board, under directions prescribed by the Director:

(1) Shall consider an application for the correction of records made by a NOAA Corps officer or former NOAA Corps officer who has filed a complaint investigated by the Inspector General of the Department of Commerce alleging that a personnel action

was taken, withheld, or threatened in reprisal for making or preparing or being perceived as making or preparing a protected communication.

(2) Shall review the investigation report issued by the Inspector General of the Department of Commerce.

(3) May ask the Inspector General to gather further evidence and issue a further report to the Records Examination Board.

(4) Shall provide a summary of the record of its proceedings, along with its recommendations, to the NOAA Corps officer or former NOAA Corps officer who has filed a complaint not later than 90 days after the NOAA Corps officer or former NOAA Corps officer made a request to convene such a Records Examination Board.

(5) Shall issue an appropriate recommendation to the Director concerning corrections, deletions, or additions to the NOAA Corps officer or former NOAA Corps officer's records not later than 90 days after the NOAA Corps officer or former NOAA Corps officer made a request to the Director to convene such a Records Examination Board. If the Records Examination Board requests a further report as provided under paragraph (b)(3) of this section and determines that it cannot issue recommendations within 90 days, the Records Examination Board shall notify the officer or former officer and the Director and provide an estimate of time remaining until completion.

(c) If the Records Examination Board determines that a personnel action was taken, withheld, or threatened in reprisal for a NOAA Corps officer making or preparing or being perceived as making or preparing a protected communication, the Records Examination Board shall forward its recommendation to the Director for appropriate correction of the NOAA Corps officer's or former NOAA Corps officer's records.

(d) When reprisal is found, the Director:

(1) Shall issue a decision concerning the correction of the NOAA Corps officer's or former NOAA Corps officer's records within 60 days of receiving the Records

Examination Board's decision, but no sooner than 20 days after receiving the Records Examination Board decision to allow sufficient time for the NOAA Corps officer or former NOAA Corps officer to submit any written disagreement with the Records Examination Board's recommendations under paragraph (c) of this section, and ensure that appropriate corrective action is taken;

(2) Shall notify the Inspector General of his or her decision concerning an application for the correction of personnel records of a NOAA Corps officer or former NOAA Corps officer who alleged reprisal for making or preparing or being perceived as making or preparing a protected communication at the time the Director issues a decision under paragraph (d)(1) of this section; and

(3) Shall take appropriate administrative disciplinary action against the individual or individuals found to have taken, withheld, or threatened a personnel action as reprisal if those individuals are under the Director's chain of command. If those individuals are not under the Director's chain of command, refer those individuals to the Deputy Under Secretary for Operations for appropriate administrative disciplinary action against the individual or individuals found to have taken, withheld, or threatened a personnel action in reprisal.

(e) The Deputy Under Secretary for Operations:

(1) Shall provide an additional level of review concerning an application for the correction of personnel records of a NOAA Corps officer or former NOAA Corps officer within 90 days of the Director's decision if requested by the officer. If the Deputy Under Secretary for Operations fails to issue such a decision within that time, the NOAA Corps officer or former NOAA Corps officer shall be deemed to have exhausted their administrative remedies and the Director's decision constitutes the final agency action.

(2) Shall take appropriate administrative disciplinary action against the individual or individuals found to have taken, withheld, or threatened a personnel action as reprisal if referred by the Director under paragraph (d) of this section.

§ 998.45 Procedures.

(a) Any NOAA Corps officer or former NOAA Corps officer who reasonably believes a personnel action was taken, withheld, or threatened in reprisal for making or preparing or being perceived as making or preparing a protected communication may file a complaint with the Department of Commerce Office of Inspector General Hotline online at <https://www.oig.doc.gov/Pages/Hotline.aspx> by phone at (800) 424-5197, or by mail addressed to: United States Department of Commerce, Office of Inspector General, 1401 Constitution Avenue, NW, Washington, DC 20230.

(b) The complaint should include relevant and specific details, including the name, address, and telephone number of the complainant; the name and location of the activity where the alleged violation occurred; the personnel action taken, withheld, or threatened that is alleged to be motivated by reprisal; the name(s) of the individual(s) believed to be responsible for the personnel action; the date when the alleged reprisal occurred; the date when the NOAA Corps officer or former NOAA Corps officer became aware of the personnel action; and any information that suggests or evidences a connection between the protected communication and reprisal. The complaint should also include a description of the protected communication, including a copy of any written communication and a brief summary of any oral communication showing the date of communication, the subject matter, and the name of the person or official to whom the communication was made. Where the complaint is submitted more than 1 year after the date when the NOAA Corps officer or former NOAA Corps officer became aware of the personnel action, the complainant should include an explanation of any circumstances which caused the complaint to be submitted more than 1 year after the complainant

became aware of the personnel action. These circumstances may include descriptions of how the NOAA Corps officer or former NOAA Corps officer was actively misled regarding their rights, or was prevented from exercising their rights.

(c) A NOAA Corps officer or former NOAA Corps officer who alleges reprisal for making or preparing or being perceived as making or preparing a protected communication may, within 20 days of receiving an investigation report, request in writing that the Director convene a Records Examination Board to consider an application for the correction of records.

(d) A NOAA Corps officer or former NOAA Corps officer who disagrees with the recommendations of a Records Examination Board may submit in writing the reasons for disagreement to the Director within 20 days of receiving the Records Examination Board's recommendations.

(e) A NOAA Corps officer or former NOAA Corps officer who disagrees with the Director's decision on a Records Examination Board's recommendations may request in writing a second level of review by the Deputy Under Secretary for Operations within 20 days of the Director's decision.